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No. 77-528

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION AND UNITED STATES

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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The Federal Communications Commission in its opening brief discussed two basic issues in this case: whether the term "indecent" in 18 U.S.C. § 1464 has a separate and distinct meaning from the "obscene," and whether the FCC reasonably concluded that certain words in the Carlin recorded monologue were indecent "as broadcast." After supporting the FCC below, the Department of Justice now has filed a brief in opposition to the FCC. We will briefly high-

light the areas of agreement and disagreement between the Department of Justice and the FCC.[1]

The Department supports the Commission on the first issue, concluding that "indecent" and "obscene" in Section 1464 have separate and distinct meanings. U.S. Br., 19-23. However, on constitutional grounds the Department argues that Congress, and therefore the Commission, may only regulate the broadcast of indecent words which are used deliberately to attack, to shock, or to outrage the audience, or "in any radio broadcast *specifically directed at younger children* regardless of when broadcast." U.S. Br., 40-41.

1. The Department notes that Congress in Section 1464 used the disjunctive: "the prohibition encompasses language which is *either* obscene *or* indecent *or* profane."[2] U.S. Br., 19. Section 1464 expressly prohibits any indecent language, and "the natural reading of the provision is that it bans the

[1] "The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order." 28 U.S.C. § 2348.

[2] " 'Profane' is, of course, capable of an overbroad interpretation encompassing protected speech, but it is also construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Tallman* v. *United States*, 465 F.2d 282, 286 (7th Cir. 1972). This case does not involve "profane" language.

use of certain words and phrases, regardless of their context." U.S. Br., 20. Since Section 1464 prohibits any indecent language, "a single mention of the offending word was forbidden, even without emphasis or repetition." U.S. Br., 20. Almost all, "if not all, of the words selected by George Carlin meet the test" of the indecent. U.S. Br., 20. Congress in Section 1464 announced a flat ban on the broadcast of indecent language; however, the Commission may construe it "to allow a more discriminating time-limitation." U.S. Br., 21.

The Department thus agrees with the FCC that this Court's decisions do not compel the conclusion that the indecent is subsumed into the obscene. There is no vagueness problem because the Commission "has adopted a definition that tracks, as near as can be, part (b) of the *Miller* standard," *Miller* v. *California*, 413 U.S. 15 (1973). U.S. Br., 22. The Department finds nothing in the meager legislative history which casts any doubt on this construction of Section 1464, and that, absent constitutional limitations, there would be no reason to limit the plain words of the statute. Finally, the Department suggests that Congress meant to go to the constitutional limit in enacting Section 1464. U.S. Br., 23.[3]

These arguments buttress the Commission's argument on the statutory construction question. Additional support for the Commission's position is found

[3] The Department also agrees with the FCC's interpretation of the "indecent" prohibition as "an anti-nuisance law." U.S. Br., 22.

in the recent Senate debate and passage of the Criminal Code Reform Act (S. 1437). The Act includes a new Section 1842, "Disseminating Obscene Material," which would make it a crime to broadcast obscene material. It would return Section 1464 to the Communications Act where it had originated.[4]

2. Despite the fact that the Commission's holding was limited to the facts complained about, the briefs in opposition continue to treat the FCC's Order "as though it prohibited any TV or radio broadcast which included one of the seven words." (A. 93). But, as Judge Leventhal pointed out below, the following factors were critical to the Commission's holding that "the language as broadcast was indecent":

> 1. The words depicted "sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media. . . ."
>
> 2. The words were broadcast "in the early afternoon * * * when children were undoubtedly in the audience."
>
> 3. The "prerecorded" words were "repeated over and over" and "deliberately broadcast." (A. 93-94)

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[4] During the debate, it became clear that the Senate regarded Section 1464 as prohibiting language beyond that prohibited under *Miller* v. *California*, 413 U.S. 15. See especially colloquy between Senator Kennedy, floor manager of the legislation, and Senator Griffin. 124 Cong. Rec. S534 (January 26, 1978). See Attachment to this brief.

This holding, as Judge Leventhal noted, necessarily included the limitations of time (the afternoon) and manner of presentation (deliberate repetition). (A. 93, 104).

Historically, the Commission has refused "to issue interpretative rulings or advisory opinions whenever the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 602 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973); see also A. 44. In view of this reticence to render broad advisory opinions, it is especially appropriate to read this order as narrowly resolving a single complaint. If Pacifica had disputed the essential findings on which the order rested, as it now appears to do, Pacifica Br. 3-4 n. 3, 48 n. 40,[5] the Commission would have afforded Pacifica "the functional equivalent of a jury determination of a clear community consensus. . . ." *Illinois Citizen Committee* v. *FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975). The Commission also would have provided "all of the formalities for an adjudicative proceeding. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 373 n. 3 (1969). But Pacifica never sought reconsideration and never asked the FCC to invoke these procedures.

In fact, the Commission specifically limited its holding to the language as broadcast, while taking the opportunity to issue a declaratory order for the

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[5] The radio broadcast statistics which Pacifica submits do not contain data for children age 2-11. See Brief for Amici Curiae ABC, *et al.* 9 n. 7.

guidance of the public and broadcast licensees. The Commission undoubtedly intended its order to provide guidance, but its holding extended only to the comedy monologue. As Judge Leventhal observed below, given the procedural posture of the case, "the issue of what might be broadcastable in the early evening is not before us, and raises different considerations." (A. 104).

While the Commission's order reserved this and other questions for future cases (A. 15-16), it did indicate that it was not retreating from prior decisions recognizing that broadcasters have a constitutional right to present controversial and provocative programming. (A. 11).

> [The order was] not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children."

(A. 18).

The declaratory order does not make the susceptibilities of young children the norm for all broadcast programming. It is entirely possible that language which would be indecent at 2 p.m., when unsupervised young children could hear it, would not be so if broadcast at a time when parents could supervise their children. The Commission will decide that very different question when it arises.

We regret that the Department of Justice has changed its mind and no longer supports the Commission's order. The approach which it proposes (U.S. Br., 40-41) turns largely on the subjective intention of the broadcaster. It does not adequately recognize the parental and privacy interests that the FCC sought to further by its order. Nor do this Court's decisions compel such a rule for broadcasters, who must make programming decisions, as public trustees, in the interest of the communities they are licensed to serve.[6]

The FCC has not imposed a flat ban on these or any other words. It seeks to channel "indecent" language out of time periods when it would be available to young, unsupervised children. The precise time "channels" have not been firmly established, they may vary from community to community, and they must be established in the first instance by each broadcaster with the knowledge of and with the assistance of his community.[7] Judicial review can ensure that the Commission will "fully respect the licensee's range of discretion, and not disaprove the licensee's

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[6] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367; *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943); *United Church of Christ* v. *FCC*, 359 F.2d 944 (D.C. Cir. 1966). See also *Programming Policy Statement*, 44 FCC 2303 (1960).

[7] "Thus, we do not intend to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve." *Programming Policy Statement, supra*, 44 FCC at 2316.

action merely because the agency had a different view of the matter, but only because the licensee had gone so far as to be marked for an abuse of its license." (A. 103-104).

Pacifica's argument in this Court abrogates its own earlier pledge to the Commission that it was "sensitive to its responsibilities to its listening audience and *carefully schedules for late night broadcasts* those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." *Pacifica Foundation*, 36 FCC 137, 149 n. 3 (1964). (Emphasis added). The Commission's order, which merely enforced those responsibilities, rests on a sound interpretation of Section 1464 in the light of this Court's decisions in analogous areas of broadcast regulation. The order seeks to protect parental and privacy interests[8] which the Commission has the duty to vindicate under the Communications Act, to the extent that this Court's constitutional opinions permit.

* * * *

[8] *Cf.* Warren & Brandeis, *"The Right of Privacy*, 4 Harv. L. Rev. 193, 195-197 (1890).

For the reasons stated in this reply brief and in our opening brief, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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ATTACHMENT

Mr. GRIFFIN. Mr. President, as the floor manager may know, I serve on the Communications Subcommittee of the Commerce Committee and it has been brought to my attention that certain portions of S.1437 which relate to broadcasting could perhaps use some clarification.

As I understand the situation, this bill would create a new section 1842, entitled "Disseminating Obscene Material," and would transfer section 1464, entitled "Broadcasting Obscene Language," from the existing criminal code to a place in the Communications Act.

In other words, if this bill is enacted, there would then be two provisions of Federal law which could deal with obscenity on the electronic media.

Proposed section 1842 would make it a criminal offense to broadcast "obscene material," which is specifically defined; at the same time, section 1464 of title 18 which would be transferred to the Communications Act, would make it a crime to utter obscene, indecent, or profane language by means of radio communication.

Now, in the hope of lessening the possibility of confusion in the future, I would like to express my understanding of the intent of the Senate with regard to these provisions and then ask the distinguished floor manager to respond.

The broader provision, the present 18 U.S.C. 1464, which refers to "radio communication" and "obscene, indecent, or profane language" remains applicable to broadcasting as well as other means of radio communication such a citi-

zens band radio. However, it should be clear that reference to broadcasting in section 1842 is not intended to make only this section applicable to broadcasting. In other words, it would therefore be possible that some broadcast material, though perhaps not obscene under the standards set forth by the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973) or within the meaning of section 1842 could still violate the indecency prohibition of section 1464. In fact the Supreme Court recently granted certiorari in *Pacifica Foundation* v. *FCC*, 556 F.2d 9 (D.C. Cir. 1977), a case where the Federal Communications Commission found some language indecent (though not obscene) within the meaning of section 1464. Of course, the Court may decide whether nonobscene (indecent) matter can be prohibited in the broadcasting medium, because of that medium's unique qualities, though the same material might be accorded first amendment protection in books, movies, or newspapers.

Thus, it is my view that this broader coverage is applicable to the broadcasting medium.

I want to be sure it is the sense of the Senate that this broader coverage is applicable and would remain applicable.

Mr. KENNEDY. Mr. President. It is our intention that section 1464 is only to be transferred into the Communications Act. In fact, footnote 100 on page 855 of the report specifically states that the broader coverage mentioned by the Senator has been preserved by transferring section 1464 to the Communications Act.

Mr. GRIFFIN. I thank the distinguished floor manager.

Mr. KENNEDY. I think that clarifies it, and I welcome the opportunity to do so.

124 Cong. Rec. S 534 (January 26, 1978).

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